Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JAYSON SEPE,
Petitioner,

v.

MCDONNELL DOUGLAS CORP.,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA) provides eligible employees may take a leave of absence from their employment for purposes specified in the act including the birth of a child. 29 U.S.C. § 2612(a)(1)(A). The questions presented are:

1. Did the Eighth Circuit Court of Appeals properly follow guidelines set out by this Court in the case of *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973) when it affirmed the district court's grant of summary judgment for defendant on Sepe's claim for retaliatory termination?
2. Did Appellant, Jayson Sepe, establish a prima facie claim for retaliatory discharge under the Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA), against his employer, McDonnell Corporation (MCD) after he was terminated upon his return from leave for allegedly violating the terms of a Collective Bargaining Agreement between his union and his employer?

LIST OF PARTIES

All parties are listed on the cover. Petitioner was plaintiff and appellant below. Respondent was defendant and respondent below.

RULE 29.6 LIST

There is no parent company nor non-wholly owned subsidiary of petitioner.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (App., infra A-1) is reported at 176 F.3d 1113 (8th Cir. 1999). The opinion of the District Court for the Eastern District of Missouri (App., infra C-7) is a decision without published opinion.

JURISDICTION

This action was brought under the Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA). Jurisdiction in the District Court for the Eastern District of Missouri was based on 29 U.S.C.§ 2617(a)(2). The District Court entered its judgment on April 29, 1998. The Eighth Circuit Court of Appeals affirmed on June 7, 1999 and denied a timely motion for rehearing on July 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

STATUTORY PROVISION INVOLVED

1. The Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* generally and in particular the definition of an eligible employee under Title I-General Requirements for Leave 29 U.S.C.§ 2611(2)(A)(ii):

   2 Eligible Employee.-

   (A) In General-The term "eligible employee" means an employee who has been employed -

   (i)...

   (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

2. The Department of Labor Regulation 29 C.F.R.§ 825.110(d):

   If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is

to commence, the employee will be deemed eligible. The employer may not, then deny the leave. (Excerpt only- See appendix D for full text of Section).

STATEMENT OF THE CASE

Appellant, Jayson Sepe, began his employment with McDonnell Douglas Corporation (MCD) in 1984 and worked there continuously except for a one year lay-off in 1991. In May of 1995, Sepe timely requested a leave of absence in anticipation of his wife giving birth to their child. His request was approved by the manager of employee records on a company form which showed the leave was for the birth and care of a newborn child and contained Family and Medical Leave instructions on the back. Sepe's wife gave birth to their daughter, Caroline, on May 7, 1995 and Sepe began his twelve week, non-paid leave the following day. While Sepe was on leave, an investigation was mobilized by MCD security personnel to determine if Sepe was working in contravention of a Collective Bargaining Agreement provision between Sepe's union and MCD. As a result of the investigation, Sepe was suspended without pay upon his return from leave on July 31, 1995. He was formally terminated in August of 1995. Sepe filed a union grievance which was denied at the initial hearing. He then obtained a lawyer and filed suit in the Federal District Court for the Eastern District of Missouri. The district court granted MCD's motion for summary judgment and Sepe appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed the judgment of the district court on June 7, 1999. The court's order denying rehearing was entered on July 12, 1999.

REASONS FOR GRANTING THE PETITION

This retaliatory discharge case was brought under the Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA). This Court should grant this petition because the Eighth Circuit Court of Appeals failed to determine plaintiff made a prima facie case under *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973), for two reasons. The first reason is the court failed to follow a Department of Labor Regulation found at 29 C.F.R.§ 825.110(d). (App., A-18). Application of this regulation would have resulted in Sepe establishing the first of three prongs of his prima facie case. This regulation has been inconsistently applied by the courts in different circuits as discussed below. The second reason is the Eighth Circuit Court of Appeals did not follow the framework established by this court in reviewing retaliatory discharge cases set out in the *McDonnell* case cited above.

A retaliatory discharge claim under the FMLA has not been addressed by this Court, however, other courts have applied the burden shifting analysis established by *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973). See, e.g., *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998); *Richmond v. Oneok, Inc.*, 120 F.3d 205, 208- 9 (10st Cir. 1997); and *Oswalt v. Sara Lee Corp.*, 889 F.Supp. 253, 259 (N.D. Miss. 1995), *aff'd*, 74 F.3d 91 (5th Cir. 1996). To establish a prima facie case of retaliatory discharge the complainant must establish the following elements: (1) He is an employee protected under the FMLA; (2) He suffered an adverse employment decision; and (3) a causal connection existed between his activity and the adverse action. *Beno v. United Telephone Company of Florida*, 969 F.Supp. 723, 724 (M.D. Fla.1997). The second element requiring an adverse employment decision is not disputed. The Eighth Circuit Court of Appeals confined its decision to the first element. Namely, whether Sepe was eligible to take a family leave and thereby protected under the FMLA.

The threshold requirement of a prima facie claim for retaliatory discharge under the framework established by *McDonnell* requires finding plaintiff is entitled to the protection of the FMLA. *Archuleta v. Colorado Dept. Of Institutions*, 936 F.2d 483, 486 (10th Cir. 1991). The FMLA requires employees work 1250 hours during the year preceding their family leave to be eligible. 29 U.S.C.§ 2611(2)(A)(ii).

The Eighth Circuit Court of Appeals decided Sepe was not eigible because the act requires 1250 hours worked in the twelve month period preceding the leave. 29 U.S.C.§ 2601. The facts show Sepe worked only 822 hours. However, the FMLA empowered the Secretary of Labor to promulgate regulations as "are necessary to carry out" the FMLA. 29 U.S.C.§ 2654. *Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133, 1134 (E.D.Va. 1997). The regulations are found in Volume 29 of the Code of Federal Regulations. 29 C.F.R. § 825.110(d), (App., A- 18). The regulation in question provides: "If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then deny the leave." § 825.110(d). The Department of Labor regulation cited above requires the eligibility determination must be made before the employee's leave commences otherwise the employer is estopped from later asserting the employee was ineligible. § 825.110(d) *supra*. The facts in this case show the leave was properly requested by Sepe and granted by MCD. MCD's assertion of Sepe's ineligibility never arose until after suit was filed in the district court. By operation of that regulation, Sepe established the first element, that he was eligible for FMLA leave and entitled to the protection of the act.

The Eighth Circuit Court of Appeals declined to address the validity of the regulation, instead holding MCD's proffered reason for firing Sepe was true. After avoiding its duty to address the validity of this regulation, the Eighth Circuit failed to follow

the established procedure for reviewing retaliatory discharge cases by skipping over its analysis of Sepe's prima facie showing. The court found MCD's proffered reason for discharging Sepe to be true. Whether MCD's reason was true or pretext is a disputed material fact which should be resolved by the trier of fact. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 503 (1993).

In holding Sepe was terminated for violating a Collective Bargaining Agreement (CBA), the Eighth Circuit Court of Appeals failed to analyze Sepe's claim of retaliatory discharge following his FMLA leave under the burden shifting analysis established by this Court in the case of *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973). The issue for the District Court for the Eastern District of Missouri and the Eighth Circuit Court of Appeals to decide in its de novo review of the district court's grant of MCD's summary judgment motion pursuant to F.RC.P. 56(c), was whether Appellant, Jayson Sepe, established a prima facie claim for retaliatory discharge under the FMLA. If plaintiff satisfies the elements above and therefore makes a prima facie case, only then does the burden shift to the employer to articulate a legitimate reason for the employee's termination. *McDonnell Douglas*, at 803. It is at this point that the Eighth Circuit's analysis failed. MCD offered as a reason for terminating Sepe the fact that he violated a (CBA) provision. This showing merely discharged MCD's burden to meet plaintiff's prima facie case. However, the inquiry does not end there. *McDonnell Douglas* at 804. When a prima facie case is established it gives rise to a presumption the firing is unlawful. When evidence is advanced showing the action taken was for a legitimate, non-discriminatory reason, this would support a finding that MCD's firing was not retaliatory, "*if believed by the trier of fact,...*". *St. Mary's Honor Center supra* at 503. (Emphasis added). The District Court and the Eighth Circuit merely took the employer's reason at face value and found the factual issue

in favor of MCD. What the Eighth Circuit failed to acknowledge was that the burden shifting inquiry, once met by both sides, disappears from consideration. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). "The Plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision.'" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), citing *Burdine*, 450 U.S. at 256. As stated by this Court, "In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage." *St. Mary's Honor Center v. Hicks*, at 502. (emphasis in original). The result to Sepe is, though he arguably established a prima facie case of retaliatory discharge against MCD, he has been denied the opportunity to show MCD's stated reason for terminating him was pretextual.[1]

[1]The Eighth Circuit did not address the third element of a prima facie case which requires finding a causal connection between the protected activity and the adverse action. The causal element has been found in factual circumstances similar to Sepe's. In the case of *Hodgens v. General Dynamics Corp.*, 144 F3d 151 (1st Cir. 1998), the court found the complainant had established causation where the evidence showed Hodgens had been warned by his supervisor that he was taking "too much time off" and advised him to "make every effort to have [his] absenteeism fall within company guidelines." His performance reviews and ranking diminished because of his absences. The court also found "close temporal proximity between two events" can give rise to an inference of causal connection. *Hodgens*, at 168. The court gave the example of protected conduct closely followed by adverse action. These criteria apply to Sepe. He was warned by his foreman before taking the family leave to be careful about working while on leave. His performance review, once excellent to outstanding, recently showed problems with punctuality and absenteeism. The "close temporal proximity" test of causation was met as Sepe was suspended immediately on his return from leave and formally terminated soon thereafter

This case should be remanded to the District Court for the Eastern District of Missouri for a proper analysis of Sepe's prima facie claim under the framework established in *McDonnell*, supra. The issues in the case brought under this new statute have immense importance to the millions of workers interested in taking family leaves for the birth of children as well as leaves for their own or family member's serious medical conditions. There is no guidance available for employers nor employees in determining questions of eligibility for FMLA leaves. The uncertainty leaves open the possibility an employer can grant a leave under the FMLA and later deny the employee's eligibility at any time. That precise situation has occurred in the instant case.

Additionally, this Court needs to rectify the situation brought about by the uncertainty of the Department of Labor Regulation found in 29 C.F.R.§ 825.110(d). Some district courts have held the regulation to be invalid: e.g. *Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133 (E.D.Va. 1997). Curiously, the regulation was cited with authority in the same district, albeit a different division, as the *Wolke* case. *Barron v. Runyon*, 11 F. Supp. 2d 676, 677 (E.D.Va. 1998). Nevertheless, the CFR in question remains identical today as it did when it first became effective. *See* 825.110(d) (7-1-95 Edition) and 825.110(d) (7-1-98 Edition). (App. A-18).

CONCLUSION

The petition for a writ of certiorari should be granted.

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